irregularity. Mr. Smith has argued that any steps taken by the applicant were taken under compulsion and in so far as the filing of accounts may have been done under compulsion this is no doubt true. But there is no evidence that the unconditional appearance was entered under compulsion and it is to be observed that a letter was written to the defendant's Solicitors on the 27th November, 1953 long before the appearance was entered setting out the main lines of the judgment and specifically mentioning the two Indentures which are not actually mentioned in the Writ. The applicant's attendance at the hearing of the issues was not compulsory and there was certainly nothing compulsory about the settlement of those issues.

For all these reasons I must refuse either to set aside or to vary the judgment and the application must be dismissed with costs. The question of a certificate for two Counsel has already been raised and I will deal with this after hearing further argument thereon.

Application dismissed.

Solicitors: *Presgrave & Matthews; G. H. Goh.*

CHINESE TIN MINES REHABILITATION LOANS BOARD v. OFFICIAL ASSIGNEE, F.M.

[O. C. J. (Thomson J.) April 19, 1956]

[Ipoh — Originating Summons No. 18 of 1956]

Bankruptcy Enactment, s. 9(ii) — Whether secured creditor in bankruptcy, who does not prove, is entitled to interest after the date of the receiving order.

In this case the Chinese Tin Mines Rehabilitation Loans Board had made advances to the bankrupt amounting to $75,050 and by way of security the bankrupt had granted a Bill of Sale in respect of certain chattels and a charge over his interest in certain mining leases. The Board did not prove their debt in bankruptcy but after the receiving order was made they took proceedings to realise their securities and asked that they be allowed to retain out of the proceeds the amount due to them at the date of the receiving order together with interest up to the date of payment to them. The Official Assignee claimed that the Board were only entitled to the amount due at the date of the receiving order and were not entitled to recover from the proceeds of sale interest which has accrued since that date.

Held: there is no reason either on authority or on principle why a secured creditor who does not prove should be deprived of the interest which the law and his contract allow him.

Cases referred to:—

(1) *Moor v. Anglo-Italian Bank* 10 Ch. D. 681, 690.
(2) *Quartermaine's Case* (1892) 1 Ch. 639.
(3) *Ex parte Lubbock* 4 De. G.J. & S. 521.
(4) *In re Savin* L.R. 7 Ch. 760, 763, 764.
(5) *In re Pearce* (1909) 2 Ch. 492, 504.
(6) *Ex parte Johnson* 3 De. G.M. & G. 218, 236.
(7) *In re Fox & Jacobs* (1894) 1 Q.B. 438, 442.
(8) *White v. Simmons* L.R. 6 Ch. 555, 558.

ORIGINATING SUMMONS.

S. B. Coates for the applicant.

S. J. Sivaprasagam for the respondent.

Thomson J. : — This is an application by the Chinese Tin Mines Rehabilitation Loans Board for the sale of certain securities which they hold for money lent by them in pursuance of their statutory powers to one Khoo Heng Phoe, now deceased, to whom I shall refer as "the bankrupt".

In 1948 the Board made advances to the bankrupt amounting to $75,050 and by way of security he granted a Bill of Sale in respect of certain chattels and a Charge over his interest in certain mining leases.

From time to time payments were made in respect of the principal amount of this loan and in respect of interest on it, but on 13th October, 1952, a receiving order in bankruptcy was made in respect of the bankrupt's estate and the same day he was adjudicated bankrupt. On 27th December, 1952, he died but I do not think that fact has any bearing on the question at issue in the present case.

At the date of the receiving order there was still a fairly substantial amount owing to the Board in respect of the loan but they took no steps of any nature whatsoever to prove in the bankruptcy. Now they are taking proceedings to realise both their securities and have asked that they be allowed to retain out of the proceeds the amount due to them at the date of the receiving order together with interest calculated in accordance with the terms of Ordinance No. 9 of 1947 up to the date of payment to them. To these proceedings they have joined as respondent the Official Assignee as trustee of the bankrupt's estate. The Official Assignee has not opposed the application for sale but claims that out of the proceeds the Board are only entitled to the amount due as at the date of the receiving order and are not entitled to recover from the proceeds of sale interest which has accrued since that date.

The position is perfectly clear. The bankrupt borrowed $75,050 from the Board and he agreed to repay that sum and to pay interest on the outstanding balance of it from time to time at the rate of 3 per cent per annum, such interest to be compounded half-yearly. These obligations on the part of the bankrupt are perfectly clear and are in no way affected by security having been given. At the date of the receiving order the amount due was $X (the exact figures will have to be ascertained on inquiry) and nothing having been paid since then the amount is now $X + Y, $Y being the amount of interest that has become due since

the date of the receiving order. The fact of bankruptcy has no bearing whatsoever on these obligations although if the Board were an unsecured creditor it might well have a very important bearing on the amount they would have to accept in satisfaction of them. In so far as the debt is provable in bankruptcy they might well have to accept less than 100 per cent of the amount due in payment and so far as it is not provable in the bankruptcy they would not be able to enforce payment until after the bankrupt had obtained his discharge the practical value of which might well be very little. Nevertheless, the fact that the bankruptcy law might compel them to accept less than the full amount of the bankrupt's obligations in full settlement does not in any way affect the fact or the amount of these obligations.

The Board, however, are in the fortunate position of being secured creditors and they think that they are in the unusually fortunate position that their security is more than adequate to cover the full amount of the bankrupt's obligations to them.

By section 9(i) of the Bankruptcy Enactment, on the making of a receiving order no creditor can have any remedy against the bankrupt's estate in respect of any debt provable in bankruptcy or may commence any legal proceedings in respect of such debt unless with the leave of the Court. But by sub-section (ii):—

> "This section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed."

By reason of the relevant provisions of the Enactment and the rules made under it a secured creditor has four courses open to him. He may rely on his security and stand aside from the bankruptcy proceedings altogether. Or he may realise his security and prove for the balance due. Or he may surrender his security and prove for his whole debt. Or he may value his security and prove for the difference between the value and the amount of his debt.

As was pointed out by Jessel, M.R., in the case of *Moor v. Anglo-Italian Bank*[1] whether the creditor stands aside or comes in and proves is a case of election and does not involve any forfeiture of his rights. The creditors has "two funds to resort to, the bankrupt's general estate, so as to get a dividend on the whole amount of his debt, or his security".

As regards interest accruing after the date of the receiving order it seems to me to be well settled that the creditor's position depends on the way he exercises his election, on whether he elects to come in and prove in the bankruptcy in one of the three ways open to him or whether he elects to stand apart and rely on his security.

Where he elects to come in and prove he cannot apply any part of the proceeds of realisation of his security to payment of interest accrued subsequently to the date of the receiving order. That was decided in *Quartermaine's*[2] case. But it is clear that *Quartermaine's* case only deals with the position of a secured creditor who seeks to prove in the bankruptcy.

In *Ex Parte Lubbock*[3] Lord Westbury had said :—

> "Nothing can be better settled by the practice of the Court for the last sixty years than that where securities consist of an equitable mortgage, and the mortgagee, after a bankruptcy, presents a petition for the realisation of that security, he is not entitled to any interest subsequent to the date of the fiat."

It is to be observed that "the Court" to which His Lordship here referred was not the Court of Chancery but the then existing Bankruptcy Court. Then in the case of *In re Savin*[4] a secured creditor who had realised his security was seeking to apply to proceeds of sale first in satisfaction of interest which had accrued since the date of an inspectorship deed under the Bankruptcy Act, 1861, and secondly in part payment of the principal of the debt owed to him. James L.J. referred to Lord Westbury's judgment in *Lubbock's* case *supra* and said the decision in that case "is plain and distinct, and is solely and exclusively addressed to the point." He went on to say-:—

> "There is a general rule in bankruptcy — whether a right and a reasonable rule or not — that there is to be no proof in bankruptcy for interest subsequent to the bankruptcy."

In *Quartermaine's* case Stirling J. expressly based his decision on *Savin's* case *supra.* He quoted the passage from the judgment of James L.J. which has just been quoted here and went on to say (at 649):—

> "That (i.e. Savin's case) is a judgment of the Court of Appeal which distinctly deals with the application of the proceeds of sale of a realized security, and it seems to me to be a distinct authority that the proceeds of sale cannot be applied in payment of interest subsequent to the commencement of the winding-up, as contended for by the mortgagees .....
> I am of opinion, therefore, that the proceeds of sale are not applicable to payment of interest accrued subsequently to the commencement of the winding-up."

What the mortgagees were contending for in the case before him was that having applied some of the proceeds of realisation towards interest accrued after the date of liquidation of the company they were entitled to prove for the whole outstanding amount of their debt and interest down to liquidation.

Savin's case, supra was again discussed many years later, this time in the Court of Appeal, by Buckley L.J. in the case of *In re Pearce*[5]. What His Lordship said about it was this ;—

> "The point in that case (i.e. Savin's case) was this: A secured creditor, some substantial time after the bankruptcy, realized his security. He was, of course, entitled to take out of it his mortgagee's costs, charges, and expenses, his interest to date, and his principal. But his security was deficient, and in that state of facts

he sought to take out of his security, first, his mortgagee's costs, charges, and expenses, then his interest to date, then such part of his principal as the balance of the sum realized in respect of the security would satisfy, and then to prove in the bankruptcy for the remaining sum. This was held to be wrong, and for obvious reasons. The secured creditor was in that case in substance seeking to prove in the bankruptcy for interest subsequent to the bankruptcy. This he could not do."

So much for *Quartermaine's* case.

On the other hand, where the creditor elects to stand aside from the bankruptcy and makes no attempt to share in the fund available for distribution among the creditors in general then both on authority and on general principles I can see nothing to prevent him exercising his rights to deal with his security so as to pay himself the full amount that is legally due to him.

In my opinion, the law is correctly stated in the following passage from *Coote on Mortgages* (9th Edition, Page 1125):—

"A mortgagee who has realized his security on the bankruptcy of the mortgagor is entitled to apply the proceeds of sale, if sufficient for the purpose, in payment to himself of the full amount of his debt with interest and costs, handing over the surplus, if any, to the trustee in the bankruptcy for the benefit of the creditors generally.

If, however, the proceeds of sale are insufficient, or if the mortgagee assesses his security, and, in either case, claims to prove for the residue, or if he abandons his security and claims to prove for the whole debt, the question arises what his rights are as regards proof for interest."

and I can see no distinction in principle between a mortgage and any other sort of security.

In the case of *Ex Parte Johnson*[6] Lord Cranworth L.C. said, "the doctrine of the Court is clear, that the creditor holding a security is entitled to apply it in discharge of whatever liability of the bankrupt he may think fit."

In the case of *In re Fox & Jacobs*[7] Williams J. held that a secured creditor who realised his security was entitled to allocate the amount realised towards interest even though that interest exceeded 5 per cent and prove for the balance of the principal due to him. That case is no longer in itself of value by reason of section 23 of the Bankruptcy Act, 1890, having been repealed and replaced by section 66 of the Bankruptcy Act, 1914, but that statutory change does not detract from the force of the following observation with which His Lordship concluded:—

"I have only to add that the general right of a secured creditor to allocate his security to that part of his debt in respect to which he had no right of proof was not disputed by the counsel for the trustee. **Ex parte Hunter** 1 M. D. & D. 25 and **Ex parte Glyn** 6 Ves. 94 are authorities under former statutes for this proposition."

In the case of *White v. Simmons*[8] Lord Hatherley L.C. described section 12 of the Bankruptcy Act, 1869, which is substantially the same as section 9(ii) of our Enactment as "an express reservation of all rights." *Pearce's* case, *supra*, is an example of how far that reservation goes. In that case the creditor had valued his security which consisted of certain insurance policies and been allowed to prove for the balance of his debt. The trustee, however, had elected not to redeem the security which was accordingly retained by the creditor. After his discharge the bankrupt effected a second mortgage on the policies in question and on realisation the creditor was allowed as against the second mortgagee both interest down to the time of sale and premiums paid after the date of the receiving order in order to keep the policies in being although neither of these sums could have been the subject of proof in the bankruptcy. In other words, the mere fact of the debtor's bankruptcy did not deprive the creditor of his contractual rights nor did it affect his right to satisfy himself in respect of them out of the proceeds of his security. He had elected and there was no question of forfeiture.

As was pointed out by Jessel, M.R., in *Moor v. Anglo-Italian Bank*[1], *supra* it all comes back to a question of election. The creditor can come in or he can stay out. If he comes in he must submit to his debt being dealt with in accordance with the bankruptcy law which says in effect that only so much of it can count as against the other creditors. If he stays out he can do anything that the law allows him to do with his security as if there had been no question of bankruptcy. He can realise it or he can retain it. As *Pearce's* case, *supra* shews, if he retains it he can do so until after the bankruptcy is at an end and then realise it in which case he can take his interest out of the proceeds without regard to the bankruptcy. And I fail to see any reason either on authority or on principle why he should be deprived of the interest which the law and his contract allow him simply because he realises before the bankruptcy has come to an end.

In the present case the creditor may repent of his election and if he seeks to go back on it he will have to take the consequences. But that is his business and no concern of the Court at this stage.

I have already ordered sale and payment of the proceeds into Court. There will be an Inquiry by the Registrar as to what is due to the creditor down to the time of such Inquiry for principal, interest and costs. So much as is found due to the creditor in this connection will be paid out to him. The balance will be paid out to the Official Assignee.

Order accordingly.

Solicitors: *Maxwell, Kenion, Cowdy & Jones.*